APPENDIX A

THE HONORABLE WILLIAM L. DWYER
NO. C97-222WD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC.

Plaintiff,

v.

MFS INTELENET, INC., et al.

Defendant.

U S WEST'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

* * * *

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As set forth in U S WEST's briefing, the Agreement should include a provision clarifying that U S WEST is not required to combine unbundled elements for MFS. See USWC Opp. at 26-29. See also USWC Br. at 30-33. This contract provision is necessary to clarify U S WEST's obligations in the Agreement because the Agreement contains broad language that "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS." Agreement at 71. The contract provision that U S WEST proposed, and that the arbitrator disallowed, that "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching

Element *to provide a finished service* to MFS,"[19] is necessary to clarify that U S WEST is *not* obligated to provide rebundling of unbundled elements into a finished service.

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[19] Arbitrator's Report at 12-13 (emphasis added); Agreement at 71 n.9.

APPENDIX B

98-35146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,
Plaintiff/Appellant,

v.

MFS INTELENET, INC., a Delaware corporation;
ANN LEVINSON, Chairperson, RICHARD HEMSTAD,
Commissioner, and WILLIAM R. GILLIS,
Commissioner, in their official capacities as
commissioners of the Washington Utilities and
Transportation Commission; and

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION,
Defendants/Appellees.

ON APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON
NO. C97-222WD

BRIEF OF APPELLANT

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C. The District Court Erred in Approving a Contract Provision Requiring U S WEST to Combine Unbundled Elements for MFS

A CLEC may either purchase (1) access to pieces of an incumbent LEC's services, so-called unbundled network elements ("UNEs"), or, in the alternative (2) finished retail services, such as basic residential or business service for resale to its own customers. The Act mandates fundamentally different pricing structures for these two types of access. Prices for UNEs must be cost-based. 47 U.S.C. §§ 251(c)(2), 252(d)(1). By contrast, resold services are priced "on the basis of retail rates charged to subscribers for the telecommunications service requested" minus costs avoided by selling the services on a wholesale basis. Id. § 252(d)(3).

For years prior to the Act's enactment, the Washington Commission has priced many finished services well above cost to subsidize residential service, which is priced below cost. For example, flat-rate business lines sell for $26.60 per month,

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while residence lines using roughly the same facilities sell for $12.50 per month. See WUTC v. U S West Communications, Inc., Docket Nos. UT-950200, UT-970766, Commission Decision and Order Regarding Tariff Revisions, slip op. at Table p. 3 (WUTC Feb. 2, 1998), App. 18.

At the time of the arbitration, the FCC had interpreted the Act to permit CLECs to purchase finished services at cost-based rates by ordering UNEs separately, and then requiring the incumbent LEC to rebundle the UNEs for the CLEC into a finished service. See 47 C.F.R. § 51.315(c)-(f). This allowed significant arbitrage on the high margin services.

After this arbitration, the Eighth Circuit rejected the FCC's interpretation and held that the Act prohibits CLECs from obtaining finished services at cost-based rates. Thus, CLECs may not require incumbent LECs to provide UNEs at cost-based rates and then require incumbent LECs to combine those UNEs into a finished service. Instead, the *requesting carrier* must combine thee unbundled elements into a finished service. See Iowa Utils. Bd., 120 F.3d at 813.

The Eighth Circuit reaffirmed and strengthened this holding in its Order on Petitions for Rehearing:

> [Section] 251(c)(3) *does not permit* a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (*or any lesser existing combination of two or more elements*) in order to offer competitive telecommunications services. To permit such as acquisition of already combined elements at cost-based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and

the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other.

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Iowa Utils. Bd. v. FCC, 1997 U.S. App. LEXIS 28652, at *3-4 (8th Cir. Oct. 14, 1997) (emphasis added).

The Agreement violates this clear mandate that CLECs (1) must combine the unbundled elements they purchase themselves, and (2) are not permitted to purchase combined elements at cost-based rates. The Arbitrator rejected U S WEST's proposed contract provision that "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." Arbitrator's Rep. at 12-14, Agreement at 71 n.9, ER 36-38, 55. Thus, the Agreement fails to provide a critical limitation on the related contract provisions that require U S WEST to "combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS" and require U S WEST to "combine elements ordinarily combined in its network in the manner they are typically combined." Agreement at 71 (XXXI.A.3), ER 55. The Agreement therefore plainly violates the Act and contravenes the Eighth Circuit's decision.

Rather than declare that the combination provisions of the Agreement violate the Act, the district court held that in the present case, "any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service." Order at 7, ER 465. However, it is unclear how the district court arrived at this conclusion, as the Agreement does not explicitly provide for any such "recombination fee."[4] Indeed, no party argued for this resolution during the arbitration or the proceedings in district court.

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[4] The Agreement does provide that "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or

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The Eighth Circuit's decisions flatly bar forced recombination of elements by incumbent LECs, not just forced recombinations at cost-based rates. Given that the Act does not require recombination, no "recombination fee" can save recombination provisions imposed in an arbitration under the Act.

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with elements possessed by MFS." Agreement 71 (XXXI.A.3), ER 55. The specific amount of any such fee is not set forth in the Agreement, nor did the court set any fee. In any case, the Eighth Circuit has declared that the Act does not require a LEC to rebundle, and the district court cannot impose such a requirement by imposing its own prices for such a service. Moreover, compensation cannot alter the meaning of the Act or otherwise justify a requirement that is contrary to the Act. See Iowa Utils. Bd., 120 F.2d at 813 (finding that an incumbent cannot be forced to provide superior quality interconnection or UNEs even though it is compensated).